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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER PART 5

Justice

Index Number : 107568/2007

SACCO, ANTHONY S.

VS.

CITY OF NEW YORK

SEQUENCE NUMBER : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO. 107568/07

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1, 2
Answering Affidavits — Exhibits	3
Replying Affidavits	4, 5, 6

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

FILED
NOV 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/12/09

HON. EILEEN A. RAKOWER J.S.C.

Check one: X FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 5

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ANTHONY S. SACCO,

Plaintiff,

- against -

THE CITY OF NEW YORK,

Defendant.

----------X

Index No.
107568/07

Seq No.: 001

Decision and Order

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff brings this action for personal injuries allegedly sustained when he tripped and fell while he was walking "on the walkway adjacent to the East River between 64th and 76th Streets" (the "East River Esplanade") in the County and State of New York on June 5, 2000. Specifically, plaintiff claims that the accident occurred "approximately between 65th and 66th and 67th Streets" and describes the area as in "extremely poorly maintained condition. Many cobblestones were missing from the walkway and many cobblestones were loose and unstable. In addition, there was a large depression in the area of that walkway." Plaintiff, in his Notice of Claim, describes that he lost his footing "as the cobblestones beneath his feet moved and/or gave way as he stepped on them." The Verified Bill of Particulars states that plaintiff "inadvertently stepped on an uneven surface and was suddenly propelled into the air." Plaintiff now moves for partial summary judgment on the issue of liability pursuant to CPLR 3212. Defendant the City of New York ("City") opposes and cross-moves to dismiss pursuant to CPLR 3211(a)(7) or, the alternative for summary judgment.

Plaintiff, in support of his motion, submits: his affidavit; the summons and complaint; two color photocopies of the subject area; a letter from Herbert W. Braunstein, Consulting Engineer to plaintiff's attorney; thirteen color photocopies; a portion of the deposition transcript of David Weeks, Parks Supervisor of the East River Esplanade; a copy of a "Site Inspection Report," dated 11/9/2004 for the East River Esplanade; a "Field Inspection Form," dated 4/19/06; a Field Inspection Form, dated 6/16/06; and several of plaintiff's medical records.

Plaintiff argues that the esplanade where plaintiff fell was in a state of "extreme

disrepair" and that City was grossly negligent in leaving a known tripping hazard unrepaired for more than five years. Plaintiff also asserts that City attempted, and failed, to repair the area. Plaintiff points to the testimony of Mr. Weeks in support of his assertions. Plaintiff submits Mr. Weeks' testimony in which he agrees that photographs shown to him depict an area that was unsafe and a tripping hazard. Plaintiff also refers to the assessment of his expert engineer who opines that "the noted condition of the walkway . . . constitutes a definite 'trip and fall hazard.'" The Court notes that photographs provided show large areas of the esplanade with no markings to identify the situs of the accident Rather, they generally depict, according to Weeks, "an area of the East River Esplanade at approximately 66th, 67th Street."

City, in opposition and in support of its cross-motion, submits plaintiff's notice of claim. City argues that plaintiff did not allege or plead that the City had prior written notice of the alleged condition. Thus, plaintiff is now barred from raising that issue. City also argues that plaintiff failed to plead that City caused or created the condition. Even if plaintiff is able to prove that City caused or created the condition, City claims that plaintiff will not be able to show that the condition existed immediately upon the conclusion of City's alleged repair work.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. *(Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]).

New York City Administrative Code §7-201(c)(2) states, in relevant part:

> No civil action shall be maintained against the city for damage to property or injury to person or death sustained in consequence of any. . . sidewalk . . .being out of repair, unsafe, dangerous, or obstructed, unless it appears that written notice . . . was actually given to the commissioner of transportation or any person or department authorized by the commissioner to receive such notice.

The only recognized exceptions to the notice requirement above are (1) where a special use confers a special benefit upon the municipality or; (2) An act of affirmative negligence by the municipality caused or created the defect. (*LoCurto v. City of New York*,

2 A.D.3d 277[1st Dept. 2003]). When it is alleged that the municipality caused or created the defect, the exception is "limited to work by the City that immediately results in the existence of a dangerous condition." (*Oboler v. City of New York*, 8 N.Y.3d 888[2007]).

While City is correct that plaintiff has failed to plead prior written notice, he does allege, albeit indirectly, that City caused or created the defect. In his complaint, plaintiff states:

> any and all repairs and/or improvements performed by the City of New York must be performed in a competent manner
>
> . . .
>
> On June 5, 2006, the sidewalk on the East River Esplanade . . . was in a dangerous and unsafe condition with many depressions and many cobblestones missing . . . as well as *improperly graded and unevenly set*. (emphasis added).

City's witness, Mr. Weeks, testifies that, in his observation, the subject area had been repaired using asphalt. Plaintiff also submits the affidavit of a professional engineer, Mr. Braunstein, in support of his argument. Mr. Braunstein affirms:

> The attempted repair of this area was completely improper and incompetent. In fact no real "repair" work was done . . . a real repair would have consisted of the entire defective area being re-excavated and a new cement poured and new hexagon block set . . .The use of dirt and asphalt as remedial or repair materials could not, would not and did not effectuate a proper repair. Their use only made things worse . . . from an engineering point of view, it was a slipshod, "spit and bubble gum" temporary half measure . . . As can be seen the defective area was not caused by "normal wear and tear" . . . there is no evidence that this disrepair was caused by "natural erosion." Improper construction clearly caused this hazardous condition.

Despite his opinion that the City negligently repaired the subject area, Mr. Braunstein fails to state that the alleged repair immediately resulted in a dangerous condition. Additionally, in a letter to plaintiff's attorney, Mr. Braunstein states that "[d]eferred and improper maintenance has clearly created and caused this condition." Thus, he has characterized the conditions depicted as maintenance, rather than a repair which immediately resulted in an unsafe condition.

Plaintiff has failed to conclusively identify the situs of the accident, and casts a wide net which includes both an uneven and depressed walkway and loose cobblestones, very distinct conditions. Further, plaintiff has failed to establish that City had prior written notice of a particular defect which caused his fall or that City caused or created the particular defect

which caused his fall immediately after an attempted repair.

Wherefore it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that defendant's cross-motion is granted and the complaint is hereby dismissed in its entirety, and the Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the Court. All other relief requested is denied.

DATED: November 12, 2009

EILEEN A. RAKOWER, J.S.C